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# Property

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## PROPERTY

W. Wade Berryhill\*

### I. 1986 LEGISLATION

The 1986 General Assembly may be remembered as much for what it did not do as for what it did. Carried over into the next session was House Bill 810, which would have abolished dower and curtesy in favor of a statutory share for the surviving spouse in the deceased spouse's estate. Of course, passage of this bill would have ushered in significant change in the practice of decedents' estates. Significantly, passage of the bill also would have legislatively overruled recent judicial and legislative activity which has created the sole and separate estate, for both female and male, allowing circumvention of the surviving spouse's claim of curtesy or dower.<sup>1</sup> Many believe House Bill 810 is a long-awaited change whose time has come, but it must wait at least one more year.<sup>2</sup>

Of those bills which became law, most noteworthy was House Bill 207.<sup>3</sup> Virginia Code ("Code") section 36-91(c) now provides that group homes, family care homes, or foster homes wherein no more than six physically handicapped, mentally ill, mentally retarded or developmentally disabled persons reside, with or without one or more resident counselors or staff personnel, shall be considered single family residences for the purpose of interpreting restrictive covenants executed after July 1, 1986.<sup>4</sup> This legislation was in direct response to *Omega Corp. v. Malloy*,<sup>5</sup> a 1984 Virginia Supreme Court decision which upheld the trial court's determination that a group home for the mentally retarded does not constitute a "single-family use."<sup>6</sup> A key finding in the case was that the

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1. See Berryhill, *Property: Annual Survey of Virginia Law*, 19 U. RICH. L. REV. 769, 780 (1985); see also *Jacobs v. Meade*, 227 Va. 284, 315 S.E.2d 383 (1984); VA. CODE ANN. § 64.1-21 (Cum. Supp. 1986).

2. See Berryhill, *supra* note 1, at 780 n.6.

3. VA. CODE ANN. § 36-91(c) (Cum. Supp. 1986).

4. *Id.*

5. 228 Va. 12, 319 S.E.2d 728 (1984).

6. *Id.* at 19, 319 S.E.2d at 732.

presence of a counselor living in the home converted the residence into a facility.<sup>7</sup>

## II. JUDICIAL DECISIONS

### A. Contracts

#### 1. Arbitration

In *Maynard Construction Co. v. Driver*,<sup>8</sup> a landowner filed suit against a contractor for breach of a contract to construct a single-family residence. The contract provided that all claims or disputes would be decided by arbitration. The circuit court denied the contractor's motion for arbitration and entered judgment in favor of the owner. On appeal, appellee owner conceded "that an agreement to arbitrate in a contract is mandatory and irrevocable unilaterally."<sup>9</sup> Since the appellee confessed error on the main issue under review, the court concluded that an obvious result was demanded. Accordingly, the trial court's decision was reversed and the case was remanded with directions to stay the proceedings to permit the controversy to be submitted to arbitration.

#### 2. Breach of Contract

In *Martin v. Terjelian*,<sup>10</sup> purchaser sought to recover a \$10,000 deposit which he argued was paid under an unconsummated oral contract to purchase real estate. The vendors defended the action, alleging that this deposit was an additional payment under a previously executed written contract which provided that deposits made under the contract would be forfeited as liquidated damages in the

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7. *Id.* The other significant areas of legislative change include: VA. CODE ANN. §§ 55-79.42, -79.72 (Repl. Vol. 1986) (condominiums); *id.* § 10-279 (Cum. Supp. 1986) (waste disposal); *id.* §§ 55-222, -248.21:1 (Repl. Vol. 1986) (requires 120 days written notice for termination of lease if due to rehabilitation and building has at least four residential units; changes rental agreement termination date requirement for military personnel); *id.* §§ 62.1-44.85 to -44.106 (Cum. Supp. 1986) (ground-personnel); *id.* §§ 62.1-44.85, -44.87, -44.90 to .93, -44.96 to .10, -44.101:1 (ground water withdrawal); *id.* §§ 15.1-261.1, -285, -364, 21-122.1 (powers of local government); *id.* § 54-25.1 (surveyor's duties); *id.* § 55-184.2 (Repl. Vol. 1986) (sale of escheated property); *id.* §§ 55-106.5, 33.1-163.1, 55-66.3, 55-9, 55-108 (recording and indexing); *id.* § 34-5 (Cum. Supp. 1986) (homestead exemption may not be claimed against debt owed for support of minor children); *id.* § 55-425 (Repl. Vol. 1986) (clarification of exception to Real Estate Cooperative Act). This list is not intended to be exhaustive, but only highlights certain changes which have broader interest.

8. 230 Va. 79, 334 S.E.2d 567 (1985).

9. *Id.* at 82-83, 334 S.E.2d at 569.

10. 231 Va. 365, 344 S.E.2d 894 (1986).

event of breach. On appeal, the Virginia Supreme Court upheld the trial court's determination that the additional \$10,000 deposit was paid toward the execution of a proposed second contract when difficulties were encountered in obtaining financing under the original contract. Since the proposed second contract was never executed, the purchaser was entitled to recover the \$10,000 paid in anticipation of the second contract despite the fact that the purchaser received, without objection, a receipt signed by the vendors marked "non-refundable deposit."

### 3. Brokers—Real Estate Agents

*Long & Foster Real Estate, Inc. v. Clay*<sup>11</sup> involved a broker's suit for a commission on a listing agreement, a counterclaim by the landowner against both the broker and the sales agent of the broker for breach of fiduciary duty, and a third-party motion for judgment by the landowner against the sales agent in the event the landowner should be liable to the broker for the commission. The landowner alleged that the sales agent did not explain the subordination agreement contained in the original sales contract which varied from the terms of the listing agreement, and that this omission resulted in renegotiation and settlement in a second contract with the purchaser. Upon trial by jury, all verdicts were returned in the landowner's favor. The jury found against the broker's claim for commission. The jury also found for the landowner in her counterclaim against the broker and sales agent for \$4,000, and for her claim against the sales agent for \$1.00.

On appeal, the broker and sales agent alleged that since the broker's liability was predicated solely upon the doctrine of respondent superior, the finding that the servant-sales agent was liable for only \$1.00 exonerated both master and servant. However, the Virginia Supreme Court upheld the trial court's entry of judgment against both broker and sales agent, citing *Cape Charles Flying Service v. Nottingham*.<sup>12</sup>

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11. 231 Va. 170, 343 S.E.2d 297 (1986).

12. 187 Va. 444, 47 S.E.2d 540 (1948). In *Nottingham*, the court stated that:

Verdicts are to be [fairly] construed, and, if the point in issue is substantially decided by the verdict, it is good, and when the meaning of the jury can be satisfactorily collected from the verdict, upon matters involved in the issue, it ought not to be set aside for irregularity or want of form in its wording.

*Id.* at 454, 47 S.E.2d at 545 (quoting *Peters v. Johnson*, 50 W. Va. 644, 645-46, 41 S.E. 190, 190 (1902)).

#### 4. Recision

In *Lerner v. Gudelsky Co.*,<sup>13</sup> the Virginia Supreme Court held that under the "plain meaning" rule, the court is not at liberty to search beyond the contractual instrument itself. Thus, the trial court erred in relying on extrinsic evidence to ascertain the purchaser's degree of experience concerning difficulties to which he might be exposed by possible demands of the Virginia Department of Highways and Transportation (VDH & T). The court scrutinized a written agreement between the parties for purchase of partnership interests of land which provided that the vendors, as of the date of settlement, had no knowledge of any administrative action which would impede development of the subject property and that the continuing truth of that representation would be a condition precedent to the purchaser's obligation. The court also held that the vendors had the burden of proof that the condition of sale had been satisfied, and that there was a failure of condition precedent where the VDH & T refused a permit even though it might have been persuaded by the expenditure of additional funds by the developer (purchasers). The purchaser, therefore, was entitled to the return of the earnest money deposit.<sup>14</sup>

In dissent, Justice Cochran, joined by Justice Stephenson, concluded that the contract was ambiguous and therefore extrinsic evidence was proper. Since the purchaser was familiar with the problems of obtaining permits with the VDH & T he should have been on notice of the potential cost of highway improvements that might be required of a developer. Justice Cochran noted that any contractual ambiguities should have been resolved against the drafter (purchaser) and, therefore, the change in requirements which made highway improvement more expensive should not have relieved the purchaser of his obligation.<sup>15</sup>

#### 5. Statute of Frauds

In *Drake v. Livesay*,<sup>16</sup> an action for breach of contract, Drake contended that the defendant, Livesay, acting on his own behalf and as agent for his wife, contracted to sell a certain parcel of land. Though the contract was oral, both parties allegedly agreed to re-

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13. 230 Va. 124, 334 S.E.2d 579 (1985).

14. *Id.* at 132-34, 334 S.E.2d at 584-85.

15. *Id.* at 134-36, 334 S.E.2d at 585-87 (Cochran, J., dissenting).

16. 231 Va. 117, 341 S.E.2d 186 (1986).

duce the terms to writing "the next day." Three days later, however, Livesay sold the parcel to another party for more money.

Drake alleged that although the contract was never reduced to writing, it nevertheless was evidenced within the requirements of the statute of frauds by an apology letter written to Drake from Livesay which qualified as a memorandum under Code section 11-2. Livesay defended on the basis that the letter was an insufficient memorandum for three reasons: (1) the letter failed to express the essential terms of the contract; (2) the letter was not signed by Mrs. Livesay, who owned the property with her husband as tenants by the entireties; and (3) the letter was a memorandum only of an offer to sell and not of a bilateral contract.<sup>17</sup>

The Virginia Supreme Court held that while the failure of Mrs. Livesay's signature on the memorandum would make a claim for specific performance fail, Mr. Livesay could be held liable for damages stemming from a contract to sell land where, at the time of such contract, such land was not owned. Therefore, the letter was a memorandum of an oral contract between Drake and Livesay sufficient to support a breach of contract action. The question of Mrs. Livesay's liability depended upon proof of agency by the plaintiff. The existence of a bilateral contract between Drake and Livesay could be inferred from the letter wherein Livesay stated "I did today sell to the Turners . . . this same property that I had told you we would sell to you."<sup>18</sup>

In *Troyer v. Troyer*,<sup>19</sup> the supreme court affirmed the trial court's denial of a husband's claim of ownership in property held in his wife's name. The court reasoned that valuable consideration existed in the wife's agreement to seek no spousal or child support in exchange for her husband's ownership interest in an executory contract to purchase the property, thus the husband had no claim of ownership. Further, the court found that deposition testimony given under oath in the divorce action satisfied the requirement of a sufficient memorandum under the statute of frauds.<sup>20</sup>

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17. *Id.* at 118, 341 S.E.2d at 187.

18. *Id.* at 119, 341 S.E.2d at 187.

19. 231 Va. 90, 341 S.E.2d 182 (1986).

20. See VA. CODE ANN. § 11-2 (Repl. Vol. 1985).

## 6. Statute of Limitations

In *Pigott v. Moran*,<sup>21</sup> the purchasers of a house and lot brought an action for damages based on fraud against the real estate agent, the realtor and the contractor. The purchasers had requested that the real estate agent find a dwelling in a completely residential community. They alleged that they had sustained financial loss due to the sale to them of land abutting commercial and industrial zoned property. The circuit court dismissed on grounds of expiration of the statute of limitations.

The Virginia Supreme Court affirmed, holding that the purchasers' claim was a personal action governed by the one-year statute of limitation<sup>22</sup> rather than the five-year statute for actions for injury to property.<sup>23</sup> The court reasoned that the fraud allegedly committed by the realtor had no impact on the real property itself. Instead, the defendants' conduct was directed at the plaintiffs personally. Therefore, the cause of action was adjudged to have accrued in March 1980, when neighbors told the purchasers about the industrial zoning of the adjacent property, and not on April 22, 1980, when the clerk of court confirmed to plaintiffs that the neighbors' information was correct.<sup>24</sup>

In his dissenting opinion, Justice Stephenson concluded that with the enactment of Title 8.01, the revisors had eliminated the distinction between direct and indirect damage to property.<sup>25</sup> Section 8.01-243 of the Virginia Code provides a two-year limitation for "personal injuries" and a five-year limitation for "injury to property." Justice Stephenson stated his belief that this was a personal action for "injury to property" and therefore section 8.01-243(B) applied. The result reached by the majority has perpetuated the malaise which code revisors sought to eliminate.

In *Cape Henry Towers v. National Gypsum Co.*,<sup>26</sup> a council of co-owners brought a claim for alleged defects in construction of a condominium complex. In turn, the builder instituted a third-party claim against the manufacturers of the exterior panels and the oil-based polyester resin coating. The circuit court entered judgment

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21. 231 Va. 76, 341 S.E.2d 179 (1986).

22. VA. CODE ANN. § 8.01-248 (Repl. Vol. 1985).

23. *Id.* § 8.01-243(B) (Cum. Supp. 1986).

24. *Pigott*, 231 Va. at 79-81, 341 S.E.2d at 181-82.

25. *Id.* at 81-82, 341 S.E.2d at 182 (Stephenson, J., dissenting).

26. 229 Va. 596, 331 S.E.2d 476 (1985).

sustaining the manufacturers' defense of the statute limitations on the third party claim and the builder appealed. The Virginia Supreme Court held that the five-year statute of limitations on claims arising out of the defective and unsafe condition of an improvement to real property operates to protect manufacturers and suppliers of ordinary building materials incorporated into improvements to real property.<sup>27</sup> The court reasoned that the legislative intent embodied in the 1973 and 1977 amendments was to exempt from protection only manufacturers and suppliers of any equipment or machinery or other articles installed in a structure.<sup>28</sup>

### B. *Condominium*

In *Frantz v. CBI Fairmac Corp.*,<sup>29</sup> the court determined that unit owners were bound by a settlement reached between the unit owners' association and the condominium developer in a suit over the violation of the full and accurate disclosure requirement of the Condominium Act.<sup>30</sup>

The issue in *Montgomery v. Columbia Knoll Condominium Council*<sup>31</sup> was whether a condominium owners' association had the authority to replace windows within an individual condominium unit over the objection of the owners of the particular unit. The association argued that since the units did not have individual meters for utilities and since expenses were apportioned among the unit owners, the association could replace the windows and assess the costs to the unit owner in an effort to reduce the common expenses. The trial court agreed and found that the association was acting within its authority for the "common good."<sup>32</sup>

The Virginia Supreme Court reversed and ruled that the association's reliance on VI/Section 2 of the bylaws of the condominium was misplaced.<sup>33</sup> This section limited liability of unit owners to

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27. *Id.*; see VA. CODE ANN. § 8.01-243(B) (Cum. Supp. 1986).

28. *National Gypsum*, 229 Va. 596, 331 S.E.2d 476 (1985).

29. 229 Va. 444, 331 S.E.2d 390 (1985).

30. VA. CODE ANN. §§ 55-79.90 to -79.103 (Repl. Vol. 1986).

31. 231 Va. 437, 344 S.E.2d 912 (1986).

32. *Id.* at 438, 344 S.E.2d at 912.

33. The bylaws provided as follows:

Every co-owner must perform promptly all maintenance and repair work within his own [unit] which, if omitted, would affect the Project and its entirety or in a part belonging to other co-owners, and is expressly responsible for the damages and liabilities which may result from his failure to do so.

*Id.* at 439, 344 S.E.2d at 913.



"maintenance and repair." Since the windows were not part of the "common elements," the installation of insulated windows constituted an improvement to individual units which was beyond the authority of the association.<sup>34</sup>

### C. *Deeds*

The construction of an express reservation in a deed was the issue in *Allen v. Green*.<sup>35</sup> This deed subjected real property to a life estate in the vendor and reserved the vendor "the right . . . to remove the portable building to be erected thereon at any time prior to her death . . . . Upon her death, the portable building . . . shall become a part of the estate of the [vendor]."<sup>36</sup> Upon the death of the vendor, the executor of the vendor's estate attempted to remove the prefabricated building. Purchasers from the original remaindermen claimed ownership of the building. The executor filed a motion for declaratory judgment. The trial court held that the building became a "permanent improvement" and belonged to the purchasers (defendants) of the remainder upon the death of the life tenant.<sup>37</sup>

The Virginia Supreme Court reversed and declared that the purchasers had constructive notice of reservation in the deed which formed a part of their vendor's chain of title. There was only one building on the tract. The concept of portability is not necessarily inconsistent with the fixed nature of buildings. The purchasers ignored the reservation at their peril, and also were charged with notice of other matters which might be disclosed upon a prudent inquiry.<sup>38</sup>

### D. *Deeds of Trust—Due-On-Sale Clause*

In *Barnes v. VNB Mortgage Corp.*,<sup>39</sup> the Virginia Supreme Court held that the proposed transfer of a beneficiary's interest under a land trust agreement would trigger the due-on-sale clause in a deed of trust. The mortgagee, therefore, was permitted to ac-

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34. *Id.*; see VA. CODE ANN. § 55-79.79 (Repl. Vol. 1986).

35. 229 Va. 588, 331 S.E.2d 473 (1985).

36. *Id.* at 591, 331 S.E.2d at 474.

37. *Id.* at 592, 331 S.E.2d at 475.

38. *Id.* at 594, 331 S.E.2d at 476.

39. 230 Va. 4, 334 S.E.2d 531 (1985).

celerate the obligation of the borrower.<sup>40</sup>

### E. *Eminent Domain*

In *State Highway & Transportation Commissioner v. Dennison*,<sup>41</sup> the Commissioner appealed the trial court's failure to strike for cause two members of the panel of commissioners. These members had acknowledged on voir dire that they had prior business dealings with and were friends of the landowner. The trial court's action left the Commissioner with no choice but to remove them by peremptory strikes in the eminent domain proceeding.<sup>42</sup> The Virginia Supreme Court affirmed the trial court, ruling that exclusion is a matter of discretion with the trial court and friendship alone is not a sufficient ground for disqualification. The court further reasoned that although the landowner and prospective jurors had conducted prior business, neither juror had any financial interest related to the issue they were being called upon to decide.<sup>43</sup>

### F. *Joint Tenancy*

In *Gifford v. Dennis*,<sup>44</sup> one joint tenant brought suit against a second joint tenant claiming sole ownership of property conveyed to them. The trial court found a resulting trust in favor of the plaintiff. The Virginia Supreme Court affirmed because the evidence showed that: (1) the defendant was an accommodation maker on the notes; (2) the defendant's name was placed in the deed as security; and (3) the plaintiff had made all the payments on the notes.<sup>45</sup>

### G. *Local Government*

In *City of Virginia Beach v. Green*,<sup>46</sup> the supreme court upheld the city's action ordering the removal of a private, recreational, wooden deck or patio extending forty feet onto the public ocean-

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40. *Id.* at 12-13, 334 S.E.2d 535-36; accord *Williams v. First Fed. Sav. & Loan Ass'n*, 651 F.2d 910 (4th Cir. 1981); see also *Lipps v. First Am. Serv. Corp.*, 223 Va. 131, 286 S.E.2d 215 (1982); *United Va. Bank/Nat'l. v. Best*, 223 Va. 112, 286 S.E.2d 221, cert. denied, 459 U.S. 879 (1982).

41. 231 Va. 239, 343 S.E.2d 324 (1986).

42. *Id.* at 241-42, 343 S.E.2d at 326.

43. *Id.* at 243, 343 S.E.2d at 327.

44. 230 Va. 193, 335 S.E.2d 371 (1985).

45. *Id.* at 199-200, 335 S.E.2d at 375.

46. 230 Va. 84, 334 S.E.2d 570 (1985).

front beach area because it constituted an unlawful encroachment on the public way. The court reasoned that the city had absolute discretion to require removal without being required to adopt standards applying equally to all persons encroaching upon the public way or to grant the owners a hearing. The court stated:

This is not the case of a private person engaged in a lawful activity in a lawful way upon his own premises, conduct which ordinarily would entitle the individual to equal protection of the laws against the unrestrained discretion of government officials: Rather, this is the case of unlawful use of public property.<sup>47</sup>

#### H. *Marital Property*

In *Venable v. Venable*,<sup>48</sup> the Virginia Court of Appeals ruled that upon decree of divorce, the trial court may grant a monetary award to one party based upon the parties' interests and equities in jointly titled marital property. Although the court may approve a conveyance which satisfies the award, it does not have authority to order either spouse to convey an interest in jointly titled property to the other.<sup>49</sup>

#### I. *Mechanics' Liens*

In *E.E. Stump Well Drilling, Inc. v. Willis*,<sup>50</sup> the Virginia Supreme Court interpreted Code section 43-16, which protects a property owner in the event a general contractor defaults. On February 16, 1981, plaintiff Willis contracted with McDaniels to purchase a lot and house that McDaniels was in the process of constructing. The contract of purchase, however, was not recorded. In March 1981, McDaniels engaged Stump Well Drilling to drill a well on the property. Stump drilled the well and billed McDaniels, but was never paid. Stump filed a mechanic's lien against the property on June 23, 1981, naming McDaniels as owner. After McDaniels failed to complete construction of the house, Willis filed a bill of complaint against McDaniels on August 6, 1981, seeking specific performance of the purchase contract. Stump also was named as a party defendant in the suit since the mechanic's lien encumbered

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47. *Id.* at 88, 334 S.E.2d at 573.

48. 2 Va. App. 178, 342 S.E.2d 646 (1986).

49. *Id.* at 185, 342 S.E.2d at 650-51.

50. 230 Va. 445, 338 S.E.2d 841 (1986).

the property. Willis ultimately acquired the property at a foreclosure sale and completed construction of the house for \$7,500. The trial court ruled that this sum was entitled to priority over the Stump lien under Code section 43-16.<sup>51</sup> Stump appealed, arguing that section 43-16 protects only owners of record when the mechanic's lien is filed. Therefore, the amount Willis expended to complete the house would not take priority over the Stump lien. The trial court framed the issue in terms of "equitable ownership" as well as "title ownership."<sup>52</sup>

The Virginia Supreme Court reversed, and held that the mechanics' lien statutes and recording statutes must be read together. The owner of an equitable interest is protected by section 43-16 only if the contract or other document evidencing his interest is recorded. Since Willis did not record her contract before Stump placed the mechanic's lien on the property, she was not eligible for the priority granted by section 43-16.<sup>53</sup>

#### J. Restrictive Covenants

In *Marks v. Wingfield*,<sup>54</sup> plaintiffs sought to enjoin the placement of recreational campers on lots in a subdivision containing restrictions against the erection of "shacks, tents, house trailers or temporary dwellings of any kind whatsoever."<sup>55</sup> Defendants claimed that the restrictions were invalid and unenforceable because prior flooding and a county ordinance protecting against flood damage had changed the character of the neighborhood from residential to recreational.<sup>56</sup> Reversing the trial court's denial of an injunction, the supreme court held that no radical change in the character of the neighborhood had occurred, because the subdivision had always been both residential and recreational in character. "When a party seeks to defeat a covenant on the grounds of changed conditions in the neighborhood, he must prove that conditions in the whole neighborhood have changed so radically as to

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51. This section provides that if "the owner" is compelled to complete a building because of the general contractor's default, the amount expended by "the owner" for such completion has priority over all mechanics' liens placed on the building. VA. CODE ANN. § 43-16 (Repl. Vol. 1986).

52. *Stump Well Drilling*, 230 Va. at 447-48, 338 S.E.2d at 841-42.

53. *Id.* at 450, 338 S.E.2d at 843.

54. 229 Va. 573, 331 S.E.2d 463 (1985).

55. *Id.* at 575, 331 S.E.2d at 464.

56. *Id.* at 575-76, 331 S.E.2d at 464.

virtually destroy the essential purposes and objectives of the agreement."<sup>57</sup>

### K. *Rule Against Perpetuities*

At issue in *The Ryland Group, Inc. v. Wills*<sup>58</sup> was whether a contract violated the rule against perpetuities and therefore was void. The purchaser of the realty (Ryland) filed a motion for judgment against the seller (Wills) alleging a breach of contract, fraud and misrepresentation. Ryland also filed suit against Wills and another party (Capital), alleging interference with the contract. Ryland had agreed to buy three lots in a subdivision. Settlement was scheduled to take place upon completion of specified work by the seller, receipt of building permits by the purchaser, certification from governmental water and sewer authorities, and Veterans Administration approval. According to the agreement, Ryland also acquired an option to purchase 255 additional lots upon the development of various facilities by the seller, such as sewers, curbs, and sidewalks. No provision was made for a settlement time but the contract stated that time was of the essence. Wills conveyed the lots subject to Ryland's purchase option to Capital. As a result, Ryland instituted its present action. The trial court sustained Capital's demurrer, reasoning that since settlement might not occur until development had been completed, which might be more than twenty-one years, the contract violated the rule against perpetuities.<sup>59</sup>

The supreme court reversed in a five part ruling, holding that: (1) the rule against perpetuities is applicable to option contracts, which are unenforceable if they may not be exercised within the period of the rule; (2) an option to purchase which, pursuant to an agreement, could only be exercised within a fixed period of less than three years after the date of the agreement, did not violate the rule against perpetuities; (3) it is a settled principle that contract terms under control of the parties must be performed within a reasonable time where the contract does not specify the time of performance; (4) a reasonable time for completion of the development of residential lots as a subdivision would be far less than twenty-one years; and (5) the contract for sale of residential lots to

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57. *Id.* at 576, 331 S.E.2d at 465.

58. 229 Va. 459, 331 S.E.2d 399 (1985).

59. *Id.* at 464, 331 S.E.2d at 403.

be developed as a subdivision did not violate the rule against perpetuities since any contingency would be performed, if at all, within the period permitted by the rule.<sup>60</sup> The court further distinguished *United Virginia Bank v. Union Oil*,<sup>61</sup> wherein a contingency depended upon performance by a third party.

#### L. *Subdivision*

The rule that a county has no authority to require a developer to make off-site improvements on existing public roads in order to obtain the county's approval of an otherwise acceptable subdivision was laid down in *Hylton Enterprises, Inc. v. Board of Supervisors*.<sup>62</sup> More recently, in *Board of County Supervisors v. Sie-Gray Developers, Inc.*,<sup>63</sup> the issue presented was whether a developer may agree voluntarily to make such improvements. The trial court, relying on *Hylton*, ruled that the county had no authority to make such requirements and sustained the defendant's motion to strike the evidence. The supreme court, however, ruled that where the developer voluntarily agreed to make improvements, he should be prevented from complaining that the agreement was ultra vires. The court stated that "one who makes a contract with a municipality is estopped to assert that it was ultra vires, when it is sought to be enforced against him."<sup>64</sup> Justice Russell, in a most persuasive dissent, perceived that the agreement was coerced and properly was refused enforcement by the trial court.<sup>65</sup>

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60. *Id.* at 465, 331 S.E.2d at 404.

61. 214 Va. 48, 197 S.E.2d 175 (1973).

62. 220 Va. 435, 258 S.E.2d 577 (1979).

63. 230 Va. 24, 334 S.E.2d 542 (1985).

64. *Id.* at 30, 334 S.E.2d at 546.

65. Justice Russell stated that:

when Hall, the original developer here, submitted a proper plan, the County refused to approve it for [failure to agree to offsite improvements]. Hall sold to [the present developer], which agreed to improve the existing road because, and only because, it could obtain the County's approval in no other way. Both Hall and [present developer] were faced with a simple choice: either 'agree' to make the road improvements or forget the proposed development. . . . I think the trial court correctly determined that the 'agreement' was coerced and properly refused to enforce it.

*Id.* at 33, 334 S.E.2d at 548 (Russell, J., dissenting).

## M. Zoning

### 1. Condominiums

In *Natrella v. Board of Zoning Appeals*,<sup>66</sup> the supreme court affirmed the trial court's decision upholding the Board of Zoning Appeals' (BZA) grant of certain variances which would permit conversion of the apartments to condominiums because the landowners demonstrated, by sufficient evidence, that denial of the variances constituted an undue hardship.

### 2. Jurisdiction and Standing

Two key procedural issues were decided by the Virginia Supreme Court in *Virginia Beach Beautification Commission v. Board of Zoning Appeals*.<sup>67</sup> The first issue was whether an appeal from the circuit court reviewing a decision of the BZA properly lies with the Court of Appeals of Virginia or the Supreme Court of Virginia. The second issue involved a question of standing. Appellant, Virginia Beach Beautification Commission ("Commission"), filed a petition for writ of certiorari<sup>68</sup> in circuit court seeking reversal of the BZA's decision to grant a height and setback variance to Hotel Associates ("Hotel"), which permitted construction of a billboard situated near the Virginia Beach-Norfolk Expressway. The trial court ruled that the Commission lacked standing and dismissed the petition.<sup>69</sup>

On appeal, Hotel contended that exclusive jurisdiction over cases from circuit courts deciding appeals from administrative agencies lies with the court of appeals under section 17-116.05(1) of the Code.<sup>70</sup> The supreme court rejected Hotel's interpretation. The court reasoned that the General Assembly, under the Administrative Process Act,<sup>71</sup> had defined "agency" to mean "board . . .

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66. 231 Va. 451, 345 S.E.2d 295 (1986).

67. 231 Va. 415, 344 S.E.2d 899 (1986).

68. See VA. CODE ANN. § 15.1-497 (Cum. Supp. 1986).

69. The court did not decide whether a petition for certiorari under § 15.1-497 is an appeal from a decision of a Board of Zoning Appeals within the meaning of § 17-116.05(1). See *Allstar Towing, Inc. v. City of Alexandria*, 231 Va. 421, 344 S.E.2d 903 (1986). A related issue pertaining to standing was decided the same day as *Virginia Beach Beautification* in *Chesapeake House on the Bay, Inc. v. Virginia Nat'l Bank*, 231 Va. 440, 344 S.E.2d 913 (1986), wherein the supreme court affirmed the trial court's refusal to permit a substitution of parties plaintiff where the original plaintiff had no standing to maintain the action.

70. *Virginia Beach Beautification*, 231 Va. at 416, 344 S.E.2d at 901.

71. VA. CODE ANN. §§ 9-6.14:1 to -6.14:25 (Repl. Vol. 1985 and Cum. Supp. 1986).

of the state government”<sup>72</sup> and that municipal corporations and counties are exempt from the provisions of the Administrative Process Act.<sup>73</sup> Therefore, the court concluded that the BZA is not a board of the state government and thus the court of appeals lacks jurisdiction over such matters.<sup>74</sup>

The supreme court also upheld the circuit court’s determination of the Commission’s lack of standing. The court agreed that the Commission is a “person” under section 15.1-497 of the Virginia Code, but held that the Commission does not meet the test for a person “aggrieved.”<sup>75</sup> The court determined that the Commission, which neither owned nor occupied real property within close proximity to the subject property of the variance, advanced no direct, immediate, pecuniary or substantial interest in the Board’s decision different from that of the general public.<sup>76</sup>

### 3. Variances

In *Board of Zoning Appeals v. O’Malley*,<sup>77</sup> the BZA had denied the landowners’ application for multiple zoning variances. Upon appeal, the circuit court reversed. However, the supreme court reversed and held that the landowners had failed to overcome the presumption of correctness applicable to the BZA’s action. The court found that the landowners had not established that the denial of the variance unreasonably restricted the use of their property.<sup>78</sup> Further, the court reasoned that the landowners’ right to use their property, which was located in a transitional zone in which both residential and commercial uses were permitted, was a conditional right, not an absolute one.<sup>79</sup>

In *Lawrence Transfer & Storage Corp. v. Board of Zoning Appeals*,<sup>80</sup> a case of first impression, the court decided which landowners are entitled to written notice of a proposed zoning change, including special exceptions and variances, as provided in Code

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72. *Id.* § 9-6.14:4(A) (Repl. Vol. 1985).

73. *Virginia Beach Beautification*, 231 Va. at 417, 344 S.E.2d at 901.

74. *Id.*

75. *Id.* at 419, 344 S.E.2d at 902.

76. *Id.* at 419-20, 344 S.E.2d at 903.

77. 229 Va. 605, 331 S.E.2d 481 (1985).

78. *Id.* at 608, 331 S.E.2d at 483.

79. *Id.* at 609, 331 S.E.2d at 483.

80. 229 Va. 568, 331 S.E.2d 460 (1985).



sections 15.1-431 and 15.1-496.<sup>81</sup> In this case, neighboring landowners brought an action challenging the BZA's grant of a special use permit. Plaintiffs alleged that the BZA had failed to comply with the notice provisions of section 15.1-431 before conducting the hearing on the application. The subject property was a ten acre tract lying within the boundaries of the vendors' 205 acre tract. None of the owners of land abutting the 205 acre tract received written notice of the hearing. However, notice was published in the newspaper by the BZA. The trial court affirmed the BZA's action and concluded that only owners abutting the ten acre tract, which included owners of the 205 acres, were entitled to notice. The landowners asserted that the ten acre tract was not a separate parcel but merely an unsubdivided parcel of the 205 acre tract. The BZA countered that the statute applies solely to property undergoing a zoning change.

The supreme court reversed, concluding that all abutting owners of the 205 acre tract were entitled to written notice.<sup>82</sup> Code section 15.1-431 mandates written notice to three categories of landowners: (1) owners of the parcel involved; (2) owners of all abutting property; and (3) owners of property immediately across the street or road from the property affected.<sup>83</sup> The court reasoned that the language of the statute applied to the parcel owners of the 205 acre tract. The court concluded that to hold otherwise permitted easy circumvention of the legislature's intent by simply carving out a smaller parcel from the core of a larger tract of land.<sup>84</sup>

#### N. *Warranty of New Dwelling*

*Seabright v. Nesselrodt*<sup>85</sup> involved a dispute between the vendees of a new dwelling and the vendor/builder of the dwelling. Code section 55-70.1 establishes certain warranties by a vendor in the sale of new dwellings. The Frederick County Circuit Court held that the warranties of section 55-70.1 related to the dwelling and its fixtures and did not extend to grading the land and landscaping. However, the court implied that if the landscaping had been so defective as to throw surface water against the foundation of the dwelling, thereby causing seepage or undermining of the founda-

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81. VA. CODE ANN. §§ 15.1-431, -496 (Cum. Supp. 1986).

82. *Lawrence Transfer & Storage Corp.*, 229 Va. at 571, 331 S.E.2d at 462.

83. *Id.* at 571, 331 S.E.2d at 462.

84. *Id.*

85. 4 Va. Cir. 322 (Frederick County 1985).

tion, a different result might be required. In this case, however, there was no evidence of physical impact on the dwelling.<sup>86</sup>

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86. *Id.* at 324-25.